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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1945 46 Supr. Ct.

No. [redacted] 99

R. H. CROWLEY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

H. D. DRISCOLL,
H. RUSSELL BISHOP,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1194

R. H. CROWLEY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, R. H. Crowley, prays a Writ of Certiorari to review the decision and judgment of the Court of Claims entered November 5, 1945, awarding judgment to petitioner in the amount of $5,540.07 (R. 31) and denying petitioner's claim for judgment in the amount of $50,328.76. Petitioner seasonably filed a motion for a new trial which was overruled on February 4, 1946 (R. 31).

Question Presented

The question is whether or not provisions in a government contract relating to the finality of the decision on questions of fact by a government inspector, similarly worded and with obvious similar intent, may be so construed that identical action may be held as arbitrary and unreasonable under some of such provisions and not under the others.

Statement

The petitioner on May 17, 1940, entered into a written contract with the defendant represented by the Chicago Quartermasters Office of the War Department whereby the petitioner in consideration of $115,625.00 agreed to furnish all labor and materials for the construction of 150 prefabricated buildings for use in Civilian Conservation Corps camps, F. O. B. Spokane, Washington, in accordance with specifications and schedules.

On May 13, 1940, petitioner was telegraphically advised of the award, and on May 14, 1940, a letter confirming the telegram dated May 13, 1940, was mailed to petitioner advising that the contract would bear date of May 17, 1940, and provided for completion on or before June 17, 1940 (R. 12-13).

Petitioner, upon receipt of the telegram of May 13, 1940, started performance of the work by setting up the necessary machinery and employing labor for the project. Much of the machinery had been used by petitioner on previous CCC contracts upon which he had worked; the mechanics and some of the carpenters needed on the instant contract were recruited from men who had worked on similar projects and were experienced in this work (R. 15).

Contracts were immediately let for about 75% of the lumber to be used on this project and was bought in accordance with the contract and specifications, and was in the grades called for in the specifications. A substantial quantity of the lumber was delivered by truck on the day the formal contract was signed and the balance was delivered as the contract work progressed (R. 15).

The Resident Engineer who was to inspect the job arrived at petitioner's plant on May 26, 1940, nine days after the commencement date of the contract, and after about one-third of the contract time for completion had expired. He

was experienced as a lumberman in working with the type of lumber that is used in the Southeast States, but his experience was limited as to the types used on the instant contract. He had two assistants. One of these had no experience with the types of lumber required by the specifications; the other had no qualifications as an inspector (R. 21).

Petitioner, on the other hand, was not only an experienced lumberman, he was highly experienced in the prefabrication of lumber and the identical type of prefabrication called for by the contract, namely, the prefabrication of CCC camps (R. 15).

Performance of the work required by the contract necessitated the making of certain templates or forms to be used in the fabrication of panels. Petitioner employed for this purpose an experienced mechanic who had made templates and forms for previous similar contracts on which petitioner had been employed.

Certain of the forms for fabrication of panels had been completed and petitioner was completing the form for the floor panels, constructed of steel angle bars according to specifications and petitioner's previous experience on similar contracts at the time the Resident Engineer arrived to inspect the job. Defendant's Resident Engineer refused to accept the forms for floor and roof panels on the ground that they were not heavy enough and petitioner, in order to meet the requirements of the inspector, then had forms made of channel irons which were unsatisfactory and resulted in many panels being damaged and wasted in their removal from the forms (R. 18).

The Court of Claims found that the Resident Engineer in requiring the change in forms, upon his belated arrival at the plant, caused four days' delay in petitioner's operations.

Prior to the arrival of defendant's Resident Engineer, whose duties included the inspection and approval of material and fabrication, substantial progress had been made in contract operations, but in compliance with the provisions of the specifications, petitioner did not proceed, except in a limited way, with actual fabrication pending arrival of defendant's Resident Engineer. Upon his arrival there was a large quantity of lumber on hand at petitioner's plant, including finished flooring, subflooring, roof sheathing, all cut to exact lengths, 2x8's, sill stock and truss members and lumber for flooring and siding (R. 19). The Resident Engineer rejected a large amount of this lumber although it had been bought according to specifications and was sound and suitable for the purpose intended (R. 19).

The rejection of so large a quantity of the lumber as described, and the requirement that lumber of better quality be used, caused petitioner to provide a crew of two or three men, who spent their time in the particular work of cutting the lumber to remove the objectionable knots at additional expense, waste of lumber, and material delay in performing the contract work. Petitioner, in view of the quantity of lumber to which the Resident Engineer objected, purchased lumber of a higher grade than he had on hand, in order to save his contract time and prevent further waste. This caused considerable additional expense as well as occasional idle time of machines and labor, lasting an hour or more on several occasions, while waiting for lumber (R. 20).

In addition to rejecting suitable lumber the Resident Engineer insisted upon removal of permissible defects by cutting operations, all of which resulted in waste and increased costs to the petitioner.

Rejection of suitable lumber and insistence upon cutting operations was a course of conduct which was consistently adhered to by the Resident Engineer through the entire

time he was inspecting the job; conduct which the Court of Claims in Special Finding of Fact No. 23 (R. 28) found was unreasonable.

With respect to many fabricated items the Resident Engineer waited, in many instances, until these items were fabricated and lined up for loading in cars and made his objection there, necessitating the taking apart and rebuilding or repairing of panels, which resulted in duplication of work, waste of lumber, and additional expense (R. 20-21).

On June 12, 1940, petitioner protested to the Chicago Quartermaster Depot against the actions of the inspector in rejecting the forms which petitioner had made, and in requiring the use of a better grade of lumber, which he termed arbitrary, and requested an extension of two weeks' time in which to complete performance of the contract. This request for extension was denied by letter from the Chicago Quartermaster Depot dated July 5, 1940 (R. 24).

The work was completed on July 13, 1940, and petitioner was paid sums aggregating $99,331.89, being the contract price of $115,625, less discount of $2,312.50, freight adjustment of $1,889.44 and liquidated damages in the amount of $12,091.17 for failure to complete within specified time (R. 24, 25).

On August 7, 1940, petitioner filed with the Quartermaster General a claim in the amount of $39,999.86 for extra labor and material furnished on demand of the inspector and remission of liquidated damages, which was rejected on November 8, 1940, by the Contracting Officer, who made findings of fact (R. 24).

Further protests were made to the War Department and on March 4, 1941, the Director of Purchases and Contracts, acting on behalf of the Secretary of War, issued a memorandum dealing with the appeal from findings of fact under this contract under which it was recommended that nine days' extension of time should be allowed to the contractor

due to the late arrival of the Resident Engineer, and that a credit of $336.91 should be allowed the contractor for the excess costs alleged to have been incurred by him in the procurement of mess table tops (R. 25).

On August 6, 1941, settlement of petitioner's claim issued from the General Accounting Office, on his claim for liquidated damages, expenses incurred for extra materials and labor, excessive waste of materials and additional overhead expenses alleged to have been incurred in the performance of the contract. Under this settlement petitioner's claim was disallowed in the amount of $34,459.79, and allowed in the sum of $5,540.07. The allowed portion of the claim represented the excess costs which were claimed in connection with table tops in the sum of $336.91, and remission of liquidated damages for nine days' delay in delivery, which were admitted to be due to the late arrival of the Resident Engineer. However, payment of the allowed portion of the claim, namely, $5,540.07, was suspended for reasons not now material, as the Court of Claims awarded judgment for that amount.

The petitioner then sued in the Court of Claims for the amount of $50,328.76 which he alleged was due to him by reason of excess costs for extra material and labor, furnished on demand, for improperly assessed liquidated damages and for demurrage and loss of profits, all of which were claimed to be due because of the continued unreasonable action on the part of the Resident Engineer (R. 5).

That Court made extensive Findings of Fact and computed the amount of liquidated damages assessed against petitioner for delay for which he was not responsible at $10,019.62 (Special Finding of Fact No. 36, R. 26). In Special Finding of Fact No. 37 (R. 27) it computed petitioner's excess costs of material and labor to be $15,311.83.

The Court entered judgment on November 5, 1945, for petitioner in the amount of $5,540.07 which had been found to be due by the War Department. In limiting judgment to

this amount the Court held that the Resident Engineer in his inspection of the work had been rigid, extreme and had taken unreasonable action and that under two clauses of the contract his action had been so unreasonable as to amount to legal bad faith. The Court held, however, that under two other provisions of the contract whereby the petitioner had agreed that the Resident Engineer should be the sole judge of certain questions of fact that the Court was "unable to hold that the action of the Resident Engineer was so arbitrary as to imply legal bad faith," citing *United States* v. *Gleason*, 175 U. S. 588, 602 (R. 36).

Reasons for Granting the Writ

The decision of the Court of Claims carries to an unreasonable extreme the doctrine of the finality of the judgment of government inspectors. It holds, in effect, that irrespective of lack of qualifications or of a fair approach to the problems involved, that the inspector's judgment is final, that the contractor must be burdened with the increased costs resulting from such erroneous final judgment and that the Courts are powerless, because of but one contract provision, to award judgment to the contractor for the amount of such increased costs.

We submit that this is erroneous and that correct doctrine as developed by this Court is that the judgment of a government agent is final only when fairly and advisedly exercised, and that where, as here, that judgment has been exercised in a rigid, extreme and unreasonable manner the government must respond in damages for the resulting increased costs to the contractor.

It is in the public interest that this Court review the case and correct the judgment of the Court of Claims.

Wherefore, it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Court of Claims in this case be granted.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1194

R. H. CROWLEY,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Claims is reported in 62 Fed. Supp. 887. It is on pages 27 to 30 inclusive of the record.

Jurisdiction

The judgment of the Court of Claims was entered on November 5, 1945. Motion for a new trial was filed by leave of Court on January 10, 1946, and was overruled on February 4, 1946.

This Court has jurisdiction under the Act of February 13, 1925, C. 229, Sec. 3, 43 Stat. 939, 28 U. S. C., Sec. 288.

Statement

Statements of the question presented and of the facts in this case are in the petition (Petition, *ante*, pp. 1-7).

Specification of Errors to Be Urged and Summary of Argument

The Court of Claims erred in construing the contract between petitioner and respondent. The Court had under consideration four clauses of the contract, all of which were similar in wording and intent. The Court, however, construed two of the said clauses as requiring a certain standard of conduct on the part of the Resident Engineer in charge of the work and the other two as permitting a different standard of conduct. It held, in effect, that he might be unreasonable and arbitrary under two provisions of the contract but could not be under the other two.

Petitioner contends that such a decision is wholly erroneous and that because of the similarity of the four clauses of the contract they should have been similarly construed. *United States* v. *Rice,* 317 U. S. 61.

The only case cited by the Court of Claims in support of its decision, *United States* v. *Gleason,* 175 U. S. 588, is not authority for the conclusion reached and is clearly distinguishable from the instant case. In the *Gleason* case there was neither pleading, proof nor finding of unreasonable action by the Resident Engineer; in this case there was not only pleading and proof of unreasonableness, there was a definite finding thereof.

ARGUMENT

Point I

The four provisions of the contract relating to the finality of the decision of the resident engineer are similar in word and intent, were intended to accomplish the same purpose and should be similarly construed.

The decision of the Court of Claims turns upon the construction of the contract between petitioner and respondent

and more narrowly upon the question of whether provisions inserted to accomplish the same purpose, and similarly worded, should be similarly construed.

The four provisions are Article 12 of the Contract, paragraph SC-5 of the Specifications and Specifications No. 2, Section 1, paragraph 2A and paragraph SC-6 of Specifications CCC No. 2.

The Court of Claims summarized Article 12 and SC-5 as follows:

> "Article 12 of the contract makes the action of the contracting officer on disputed questions of fact final, subject to appeal within 30 days to the head of the department. The specifications, SC-5, make final the interpretation of the drawings and specifications by the resident engineer, subject to appeal within 30 days to the head of the department" (R. 29).

The relevant part of Specifications No. 2, Section 1, paragraph 2A reads as follows:

> "Irrespective of grading rules quoted, any materials having defects that would be obviously detrimental, either to the construction or for the use for which it is intended, will not be accepted in fabricated materials."

Specifications CCC No. 2, SC-6, insofar as relates on this controversy reads:

> "• • • In all cases where an article is mentioned in the specifications in connection with the words "best quality", "approved quality", or "equal to", the Resident Engineer shall decide what is the best quality and most suitable article to use, subject to appeal provision included under paragraph SC-5, above."

The Court of Claims said that if the first two provisions were the only ones involved, the Court "would be inclined to hold that the action of the engineer in charge was so

clearly erroneous as to imply legal bad faith." The Court of Claims then quotes the other two provisions and says:

> "These provisions, to which plaintiff agreed, make the question of the quality of the materials one of fact, to be determined by the resident engineer. In the light of the plain provisions we are unable to hold that the action of the resident engineer was so arbitrary as to imply legal bad faith."

This language of the Court imports into the contract distinctions which are not there. Each of the four provisions deals with questions of fact and the authority of the resident engineer to determine those facts.

Article 12 of the contract states that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer" with the usual provisions relating to appeal.

SC-5 which makes provision for the Resident Engineer to be the "interpreter" of the intent and meaning of the drawings and specifications contains the 30-day appeal provision.

Specifications No. 2, Section 1, paragraph 2A deals with defects "that would be obviously detrimental." Certainly the question as to whether or not such defects would be obviously detrimental is a question of fact.

Finally Specifications CCC No. 2, SC-6, in conferring upon the Resident Engineer the power to decide "what is the best quality and most suitable article to use" subject to appeal, conferred upon him the power to decide questions of fact.

All these provisions relate to the decision of questions of fact. By their very wording it is obvious that all were written into the contract for one purpose: to place the authority to decide inevitable disputes in some person in order that a ruling might be made and the progress of the work

be not hindered by prolonged disputes. This authority, however, is not an absolute authority to make final decisions. Decisions made under that authority are final only when made advisedly, reasonably and with full consideration of the rights of both parties. *Ripley* v. *United States,* 223 U. S. 695, 702.

The Court of Claims, however, holds that under two articles of the contract the Resident Engineer's authority is absolute, irrespective of the manner in which it is exercised.

The Court said:

> "These provisions, to which plaintiff agreed, make the question of the quality of materials one of fact to be determined by the Resident Engineer" (R. 30).

We do not dispute the correctness of this statement. We submit, however, that such a statement does not decide the case; that such a statement is equally correct and applies with equal force to the other related contract provisions. The petitioner agreed to those provisions no less than to the ones upon which the Court of Claims relies and all of them govern the decisions of questions of fact.

The principle that similar provisions in government contracts should be construed in the same way is well illustrated by the decision in *United States* v. *Rice,* 317 U. S. 61. One of the questions there was the interpretation of Articles 3 and 4 of the contract in question. Article 3 governed the procedure under which alterations in the specifications could be made for general causes; Article 4 governed the procedure under which the government might alter the contract to meet unanticipated physical conditions. Both clauses essentially provide that if changes were made affecting an increase or decrease of cost of affecting the length of time of performance, an equitable adjustment should be made.

In disposing of the question the Court said through Mr. Justice Black:

> "Clearly questions of interpretation in clauses so similar should, if possible, be resolved in the same fashion in each of them." (317 U. S. 61, 67.)

That rule should be applied here. That the action of the Resident Engineer was so clearly erroneous as to imply legal bad faith was the decision of the Court of Claims. That action was taken in deciding questions of fact and it applies to decision of all questions of fact which he had primary authority to decide, irrespective of various contract clauses conferring that authority.

Point II

United States v. Gleason, 175 U. S. 588, Does Not Support the Decision of the Court of Claims

The Court of Claims relies on *United States* v. *Gleason*, 175 U. S. 588. The *Gleason* case, however, is not authority for the conclusion reached by the Court of Claims. It is true that in that case this Court held that where the question as to granting extensions of time was committed to the Resident Engineer in charge that his decision as to whether or not such extension should be given was final, but in that case the question of unreasonableness and arbitrariness was not sufficiently alleged or proved to form a basis for the contention of the contractor that the action of the Resident Engineer had been arbitrary and unreasonable in denying the contractor further extensions of time. The Court in its opinion on page 608 states that the allegation as to unreasonableness "was wholly insufficient on which to base an attempt to upset the judgment of the Engineer," and on the same page further found that there was neither evidence nor a finding based on evidence which would have sustained a stronger and more adequate

allegation than that which was contained in the petition. In this case, however, there was pleading, proof and finding of unreasonableness.

That the Court of Claims should have overlooked this very clear distinction between the *Gleason* case and the instant case is puzzling. It is difficult to see how it could be unmindful of the many cases in its reports and in the reports of this Court which clearly hold that the action taken by a Resident Engineer where his judgment is final is binding upon the contractor only in the absence of allegation and proof of unreasonableness or inexperience so gross as to amount to legal bad faith. The principles which govern the conduct of an inspector in such circumstances are as stated by this Court in the case of *Ripley* v. *United States,* 223 U. S. 695. The Court there said on page 701 and page 702:

> "But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties. The finding by the Court that the inspector's refusal was a gross mistake and an action of bad faith, necessarily, leads to the conclusion that the contractor was entitled to recover the damages caused thereby."

It is this decision and this principle which should have been followed in this case.

The holding of the Court of Claims is tantamount to saying that a Resident Engineer on a government contract may under one provision of such a contract which makes his judgment final take any action which he sees fit and the contractor is helpless, although under similar clauses of the same contract the Resident Engineer's action must meet the test of fairness and reasonableness. Such a conclusion is not supported by any decision of the Court of

Claims nor of this Court. Such a construction of the contract in question is wholly unwarranted, is against the established rules for the construction of contracts and the Court of Claims gave no reason for so construing the contract nor cited any cases in support of such a construction. It works an obvious injustice upon one without fault by a rigid, technical distinction which is without validity when the contract is considered as a whole.

Conclusion

The decision of the Court of Claims is erroneous. The writ of certiorari should be granted and upon a final hearing the judgment of the Court of Claims should be reversed.

H. D. Driscoll,
H. Russell Bishop,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 99

R. H. CROWLEY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 27–30) is reported at 62 F. Supp. 887.

JURISDICTION

The judgment of the Court of Claims was entered on November 5, 1945 (R. 31). A motion for new trial was overruled on February 4, 1946 (R. 31). The petition for a writ of certiorari was filed on May 3, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether, where petitioner entered into a contract with the United States which provided that certain questions of fact arising thereunder were to be decided by the Government's resident engineer and others by the contracting officer, subject in each instance to appeal to the head of the department, petitioner may recover by a suit in the Court of Claims on claims which depend upon determinations of fact made adversely to petitioner by the resident engineer and by the contracting officer, and which were affirmed on appeal by the head of the department.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract and specifications involved are set forth in Appendix, pp. 13–18.

STATEMENT

On May 17, 1940, petitioner entered into a contract with the United States by which he agreed, for a consideration of $115,625, to furnish all labor and materials for the construction of 150 prefabricated buildings for use in Civilian Conservation Corps camps (R. 12–13). Work under the contract was to be completed by June 17, 1940 (R. 13). The petitioner did not complete performance, however, until July 13, 1940, and, pursuant to the contract (R. 9, 13–14), liquidated damages were assessed against him for 26 days' delay (R. 13). Upon completion of the

contract, petitioner was paid the contract price minus the liquidated damages, a discount, and a freight adjustment (R. 13, 24).

Work under the contract was to be performed pursuant to specifications, which were made a part of the contract by reference (R. 13), pursuant to which the lumber to be used for various parts of the buildings was to be of the grades therein set forth (R. 10–11). As found by the court below (R. 21):

> Within the same grades of lumber there will be a range of quality. All lumber No. 2 grade will not be of the same quality, but there are ranges within the grades, some of which will approximate high quality of the preceding grade and low quality of the next higher grade. Cutting operations, if properly conducted, would eliminate many defects in lumber by allowing varying qualities within the grade to be used in fabrication of different items required under the specifications without going outside the grade range set by the specifications.

Under the contract, disputes concerning questions arising thereunder were to be decided by the contracting officer, subject to appeal to the head of the War Department (R. 8; *infra,* p. 13), and the Government's resident engineer was to be "the interpreter" of the intent and meaning of the specifications, subject to a like appeal (R. 16; *infra,* pp. 15–16).

The specifications provided further (R. 18; *infra,* p. 17) that

> Irrespective of grading rules quoted, any materials having defects that would be obviously detrimental, either to the construction or for the use for which it is intended, will not be accepted in fabricated materials

and that (R. 16; *infra,* p. 16);

> Except it be otherwise specified, all materials shall be of the best quality of their respective kinds * * * In all cases where an article is mentioned in the specifications in connection with the words "best quality", "approved quality" or "equal to", the Resident Engineer shall decide what is the best quality and most suitable article to use, subject to appeal * * *"

The resident engineer arrived at petitioner's plant nine days after the commencement date of the contract (R. 18). At that time he rejected certain work that had been performed by petitioner prior to his arrival (R. 18). Thereafter, the resident engineer from time to time rejected other work of petitioner and rejected certain lumber purchased by petitioner for the purpose of the contract. The lumber purchased by petitioner was, the court below found, "in the grades called for in the specifications" (R. 15). The resident engineer did not require petitioner to furnish lumber of a higher *grade* than called for by the specifications, "but he declined to accept the lum-

ber without elimination of the knots, which under his interpretation of the contract specifications would lessen the strength of the fabricated panels", and he required a better *quality* of lumber to be furnished (R. 19–20). The court below found that "in view of the quantity of lumber to which the Resident Engineer objected", petitioner purchased lumber of a higher *grade* than called for by the specifications even though he was not required to (R. 20).

On June 12, 1940, petitioner protested to the Chicago Quartermaster Depot against the various rejections by the resident engineer, claiming that they were "arbitrary", and requested an extension of two weeks' time in which to complete performance of the contract. This request was denied by letter from the Chicago Quartermaster Depot (R. 24). On August 7, 1940, petitioner filed with the Quartermaster General a claim in the amount of $39,999.86 for extra labor and material furnished on demand of the inspector and remission of liquidated damages (R. 24). Thereafter, the contracting officer made and transmitted to petitioner special findings of fact, setting forth fully the reasons upon which the denial of extension of time, denial of refund of liquidated damages, and denial of extra compensation were based (R. 24). Petitioner then wrote to the Quartermaster General, "protesting the adverse decision of the Contracting Officer and the inter-

pretations of the Resident Engineer and taking exceptions to the Contracting Officer's findings of fact" (R. 24). The Quartermaster General treated this letter as an appeal (R. 24). On March 8, 1941, "the Secretary of War filed his findings of fact relative to the appeal * * * from the engineer's interpretation of the specifications as well as the appeal from the findings of fact of the Contracting Officer" (R. 25) and recommended that a nine-day extension of time and remission of liquidated damages for this period should be allowed petitioner (R. 25) because of the nine-day delay in the resident engineer's arrival at petitioner's plant (R. 18, 29). The Secretary of War further recommended that a credit of $336.91 be allowed petitioner for excess costs incurred by him in procuring mess table tops (R. 25), as required by the resident engineer, of a better *grade* of lumber than called for by the specifications (R. 20–21, 29).

On August 6, 1941, the General Accounting Office settled petitioner's claim by disallowing $34,459.79 and allowing it in the amount of $5,540.07, the latter sum comprising the excess costs incurred by petitioner in connection with the table tops and the remission of nine days' liquidated damages (R. 25). Payment of the allowed portion of the claim, however, was suspended on the theory that petitioner was "liable for payment of claim due to the United States

* * * arising out of default on prior contracts" (R. 25–26).

On March 12, 1942, petitioner brought this suit in the Court of Claims (R. 1–6) seeking recovery of its claim for $39,999.86 for extra costs and remission of liquidated damages, $328.90 for demurrage charges, and $10,000 profit (R. 4–6). The court found that the resident engineer, in requiring petitioner to make changes in certain work performed by him and in rejecting certain lumber, caused petitioner additional expense and delayed performance of the contract (R. 19); that the resident engineer was rigid in his inspection and rejection of a considerable amount of lumber and fabricated units (R. 21); that, while "his rejection of a considerable amount of lumber and fabricated units" was "unreasonable", the Resident Engineer acted under his interpretation of the specifications" (R. 21); and that some of the delay in performance was due to petitioner's "faulty workmanship" (R. 24). The court held that the question of the quality (as distinguished from the *grade*) of lumber used by petitioner was, under the specifications, "one of fact to be determined by the resident engineer" (R. 30) and that "we are unable to hold that the action of the resident engineer was so arbitrary as to imply legal bad faith" (R. 30). The court held further that the debt to the United States, on account of which the General Accounting Office had suspended payment

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of the $5,540.07 which the Secretary of War had found to be due petitioner, was not his debt, and entered judgment for petitioner for that amount "in accordance with the decision by the head of the department" (R. 30, 31, 25–26).

ARGUMENT

It has long been settled that where the parties to a contract have agreed that the contract or specifications are to be interpreted, or disputes concerning questions arising thereunder are to be determined by a specified person (who may or may not be an officer or employee of one of the contracting parties), the interpretations and determinations of that person are conclusive upon the parties to the contract and on the courts and may not be questioned absent a showing of bad faith or error so gross as to imply bad faith. *Kihlberg* v. *United States,* 97 U. S. 398; *Sweeney* v. *United States,* 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March,* 114 U. S. 549, 553; *Chicago & Santa Fe Railroad* v. *Price,* 138 U. S. 185; *Ripley* v. *United States,* 223 U. S. 695, 704; *Plumley* v. *United States,* 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393; *United States* v. *Mason & Hanger Co.,* 260 U. S. 323, affirmed on rehearing, 261 U. S. 610; *United States* v. *McShain,* 308 U. S. 512, 520–521.

The instant contract provided that the resident engineer was to be the interpreter of the intent

and meaning of the specifications (R. 16; *infra,* pp. 15–16); that the materials used were to "be of the best quality of their respective kinds" and that the resident engineer was to "decide what is the best quality" (R. 16, *infra,* p. 16); that "irrespective of grading rules", defective materials would not be accepted in fabricated materials (R. 18; *infra,* p. 17); and that disputes under the contract were to be decided by the contracting officer subject to appeal (R. 8, 29; *infra,* p. 13). Pursuant to the authority which petitioner and the Government had thus conferred upon him, the resident engineer rejected certain materials furnished by petitioner. Except with respect to the table tops, which are not here in issue, the resident engineer did not require petitioner to procure lumber of higher *grades* than set forth in the specifications (R. 19). He merely required petitioner to treat the lumber, *e. g.,* by removing knots, so as to improve its *quality* (R. 19–20). Such action by the resident engineer was clearly within his authority under the contract and specifications and, in the absence of a showing of bad faith, was conclusive upon the parties to the contract and on the courts. *Supra,* p. 8.

Petitioner asserts, however, that the resident engineer did act in bad faith. But the court below found against petitioner on this contention. It found that the resident engineer was rigid in his inspection of the lumber (R. 21, 29); that in his

rejections he "acted under his interpretation of the specifications" (R. 21); and that, while his action in this respect may have been "unreasonable" (R. 21), it was "not intentional" (R. 29) but rather was "attributable to his limited experience with the particular character of lumber * * * which was used on this project" (R. 21–22). Thus the court below had affirmatively found that the resident engineer's actions were not induced by bad faith. Had the resident engineer required petitioner to furnish lumber of a higher *grade* than that required by the specifications, as he did with respect to the table tops (R. 20; *supra*, p. 6), a different problem might be presented. But the court held there was no clear error in the resident engineer's requirement that the lumber furnished be of better *quality* than petitioner had procured (R. 29–30). As the court held, "the question of the quality of the materials [was] one of fact to be determined by the resident engineer" (R. 30). In the light of the plain provisions of the specifications that materials were to "be of the best quality of their respective kinds" (R. 16; *infra*, p. 16), and that the resident engineer was to "decide what is the best quality" (R. 16; *infra*, p. 16), the court below was clearly correct in refusing "to hold that the action of the resident engineer was so arbitrary as to imply legal bad faith" (R. 30).

Moreover, whatever may have been the limited experience of the resident engineer (R. 21–22), there is no finding or suggestion below that the contracting officer or the head of the department, to whom petitioner appealed from the resident engineer's decision, suffered from any such disability or acted in bad faith. Cf. *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393. And petitioner had agreed that, upon such appeal, the decision of the head of the department would be "final and conclusive" (R. 8, 16; *infra,* pp. 13, 16).[1] Clearly "the contract did not contemplate that the opinion of the court should be substituted for that of" the head of the department. *Ripley* v. *United States,* 223 U. S. 695, 704.[2]

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[1] Petitioner urges (Pet., 10–14) that the court below inconsistently held that while the action of the resident engineer might have been so arbitrary under Article 12 of the contract and SC–5 of the specifications (R. 8, 16; *infra,* pp. 13, 15, 16) as to imply bad faith, the authority conferred upon him under Specification No. 2, Section I, paragraph 2A and SC–6 (R. 16–18; *infra,* pp. 16, 16–17) was such that it justified his actions. Whatever might have been the force of this objection had there been no appeal, the fact that the head of the department made a final ruling in the matter would seem to be dispositive of this contention.

[2] The court below denied petitioner recovery of the liquidated damages which had been assessed against him by the Government for failure to complete performance within the time specified by the contract (except with respect to so much of the claim for remission of liquidated damages as had been allowed by the head of the department (R. 25, 30)), and petitioner appears to have abandoned his claim for such recovery here. In any event, it is clear that petitioner could

CONCLUSION

The decision below is correct, no question of general importance is presented, and the controversy turns on questions of fact. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
PAUL A. SWEENEY,
ABRAHAM J. HARRIS,
Attorneys.

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be entitled to remission of liquidated damages only to the extent to which he was entitled to an extension of time for performance of the contract and that whether he was entitled to such extension was, under the contract, a question for the decision of the contracting officer, subject to appeal to the head of the department (R. 6–10). On petitioner's appeal from the contracting officer's adverse decision, the head of the department remitted liquidated damages for the nine-day delay in the resident engineer's arrival at petitioner's plant (R. 24–25, 29) and the amount of such remission was included by the court below in the judgment it awarded petitioner (R. 25, 30–31).

APPENDIX

CONTRACT PROVISIONS

ARTICLE 12. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. * * *

ARTICLE 15. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto: Article 5 deleted and paragraph captioned "Delays—Liquidated Damages" appearing on sheet 7 of Schedule of Supplies, is substituted therefor; * * *.

Delays—Liquidated Damages.—If the contractor refuses or fails to make delivery of the materials or supplies within the time specified, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and in lieu thereof, the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each calendar day of delay in making delivery, *a sum equal to one-half of one per centum* (½ *of 1%*) *of the price of each incomplete unit* (one complete camp or complete group of supplementary buildings and materials intended for one camp will be considered a unit), *for each calendar day's delay after the*

date or dates specified for deliveries, and the contractor and his sureties shall be liable for the amount thereof: Provided, however, That the Government reserves the right to terminate the right of the contractor to proceed with deliveries or such part or parts thereof as to which there has been delay, and to purchase similar material or supplies in the open market or secure the manufacture and delivery thereof by contract or otherwise, charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere: Provided further, That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable in the open market, if the contractor shall notify the contracting officer in writing of the cause of any such delay within 10 days from the beginning thereof, or within such further period as the contracting officer shall, with the approval of the head of the department or his duly authorized representative, prior to the date of final settle-

ment of the contract, grant for the giving of such notice. The contracting officer shall then ascertain the facts and extent of the delay, and extend the time for making delivery when in his judgment the findings of fact justify such an extension, and his findings thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for making delivery shall be final and conclusive on the parties hereto.

SPECIFICATIONS

Specifications CCC No. 2, Special Conditions, provides as follows:

> SC–4. *Inspection of the Work.*—The work is entirely under the control of The Q. M. G. and he or his authorized representative may have access to the same at all times. It is contemplated that inspection will be made continuously by a representative or representatives of the U. S. These inspectors may be stationed at the Contractor's plant during the period of fabrication, and all reasonable facilities will be furnished said inspectors for the purpose of assuring themselves that the details of the drawings and the provisions of the specifications are complied with.
>
> SC–5. *Interpretation of Contracts.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to complete the work according to the true intent and meaning

of the drawings and specifications, of which intent and meaning the Resident Engineer shall be the interpreter, except as otherwise provided in this contract, subject to written appeal by the Contractor within 30 days to the head of the Department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime, the Contractor shall diligently proceed with performance. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

SC–6. *Quality of Materials.*—Except it be otherwise specified, all materials shall be of the best quality of their respective kinds. Where two or more varieties of materials are specified for any purpose, it shall be optional with the Contractor which is used, but in any one instance the same material must be used throughout for that particular purpose. In all cases where an article is mentioned in the specifications in connection with the words "best quality," "approved quality," or "equal to," the Resident Engineer shall decide what is the best quality and most suitable article to use, subject to appeal provision included under paragraph SC–5, above.

Specifications No. 2, Section I, Specifications for Materials, paragraph 2A, provides as follows:

All softwood shall conform to Federal Specification MM–L–751a, and all hardwood lumber shall conform to Federal Specification MM–L–736 as to general instructions and specific requirements as amplified herein.

NOTE.—*Fabricated Units.*—All lumber, including the three classes, boards, dimension, and finish flooring, purchased by the bidder for use in fabricating the various units of the different camp buildings shall not be lower in grade than that specified for each class of material. After fabricating, each piece shall be subject to the further restrictions as to knots, shakes, crooks, and other defects specified for each class, especially shakes or splits in any piece intended for roof trusses, joists, and rafters. (See Par. 2–B for Specific widths of boards permitted.) Irrespective of grading rules quoted, any materials having defects that would be obviously detrimental, either to the construction or for the use for which it is intended, will not be accepted in fabricated materials.

Specifications CCC No. 2, Special Conditions, paragraph SC–12, provides:

SC–12. *Inspection and Acceptance or Rejection of Work.*—The Contractor must understand that all materials, built-up sections, etc., delivered by him prior to final acceptance and payment for same, shall be subject to the inspection of The Q. M. G., or his authorized agent, with full right to accept or reject any part thereof, and that he must, at his own expense, within a reasonable time remedy any defective or unsatisfactory materials, and that in event of his failure to do so, after notice, the C. O. shall have full right to have same replaced and to deduct the cost thereof from any money due to the Contractor. The Resident Engineer may require the removal of rejected material from the site of the work.

Authorized agents of the United States, other than those designated by the Contracting Officer, shall be given full opportunity to inspect materials, built-up sections, etc., at any and all times.

U. S. GOVERNMENT PRINTING OFFICE: 1946